IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 9TH MARCH 2007 / 18TH PHALGUNA 1928

SA.No. 144 of 1993(A)

AS.18/1988 of ADDL.DISTRICTCOURT, PALAKKAD
OS.75/1984 of SUB COURT, OTTAPPALAM.
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APPELLANT:- (2nd RESPONDENT/2ND DEFENDANT)

KRISHNANKUTTY EZHUTHASSAN
S/O.NARAYANAN EZHUTHASSAN
RESIDING AT CHERPLACHERRY AMSOM
PANNIAMKURUSSY DESOM,
OTTAPALAM TALUK, PALAKKAD DISTRICT.
(LEGAL REPRESENTATIVES OF THE DECEASED APPELLANT IMPLEADED)
ADDL.2. CHANDRIKA, W/O.KRISHNANKUTTY EZHUTHASSAN, CHERPLACHERRY AMSOM, CHERPLACHERRY POST.
ADDL.3. JAYAPRAKAS, S/O.KRISHNANKUTTY EZHUTHASSAN, CHERPLACHERRY AMSOM, CHERPLACHERRY POST.

ADDL.4. JAYASREE, D/O.KRISHNANKUTTY EZHUTHASSAN, RESIDING AT PADAIKKARA P.O. PERINTHALMANNA.
ADDL.5. JAYARAJAN, S/O.KRISHNANKUTTY EZHUTHASSAN, CHERPLACHERRY AMSOM, CHERPLACHERRY POST.

ADDL.6. JAYAKRISHNAN, S/O.KRISHNANKUTTY EZHUTHASSAN, CHERPLACHERRY AMSOM, CHERPLACHERRY POST.

LRS OF THE DECEASED APPELLANT ARE IMPLEADED AS ADDITIONAL APPELLANTS 2 TO 6 AS PER THE ORDER DATED 14.11.97 ON CMP 2052/96.

BY ADV. SRI.D.KRISHNA PRASAD
SRI.P.SHRIHARI
SRI.D.NARENDRANATH

RESPONDENTS:(RESPONDENTS 1 & 3 AND APPELLANTS 1 TO 3/ PLAINTIFF & DEFENDANTS 1 AND 3 TO 5)
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1. ACHUTHAN,
S/O.NARAYANAN EZHUTHASSAN
RESIDING AT CHERPLACHERRY AMSOM

PANNIAMKURUSSY DESOM
OTTAPALAM TALUK, PALAKKAD DISTRICT.

2. KUNHUNNY,
S/O.NARAYANAN EZHUTHASSAN
CENTRAL BANK OF INDIA,
AUDIT DEPARTMENT FIRDOS BUILDING,
KHANPUR, AHAMADABAD - 1.

3. CHINNAMMA,
D/O..NARAYANAN EZHUTHASSAN,
RESIDING AT CHERPLACHERRY AMSOM,
PANNIAMKURUSSY DESOM,
OTTAPALAM TALUK, PALAKKAD DISTRICT.

4. LAKSHMIKUTTY AMMA,
S/O.NARAYANAN EZHUTHASSAN,
RESIDING AT CHERPLACHERRY AMSOM,
PANNIAMKURUSSY DESOM,
OTTAPALAM TALUK, PALAKKAD DISTRICT.

5. RAMANKUTTY EZHUTHASSAN,
S/O.NARAYANAN EZHUTHASSAN
RESIDING AT CHERPLACHERRY AMSOM
PANNIAMKURUSSY DESOM,
OTTAPALAM TALUK, PALAKKAD DISTRICT.

BY ADV. SRI.R.RAJESH KORMATH
SMT.PREETHY KARUNAKARAN
SMT.MEENA.A.
SMT.M.R.MINI
SMT.SANJANA R.NAIR
SRI.RAHUL VARMA
SRI.V.S.ROBIN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 9 /3 /2007, THE COURT ON 09/03/2007 DELIVERED THE FOLLOWING:-

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.144 OF 1993

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Dated this the 9th day of March, 2007

JUDGMENT

Second defendant in O.S. 75/1984 on the file of Sub Court, Ottapalam is the appellant. First respondent is the plaintiff and other defendants are other respondents. Appellant died subsequent to the filing of the appeal. Additional appellants 2 to 7 were impleaded as his legal heirs. First respondent filed the suit seeking a decree for partition and allotment of his share over plaint A and B schedule properties. Plaint A schedule property originally belonged to Narayanan Ezhuthassan. Plaint B schedule property originally belonged to Velappan Ezhuthassan, brother of Narayanan Ezhuthassan. On the death of Velappan Ezhuthassan, his rights devolved on Paru Amma, his wife. On her death, plaint B schedule property admittedly devolved on Narayanan Ezhuthassan. Sixth defendant is his widow. Plaintiff and defendants 1

to 5 are their children. According to plaintiff, on the death of Narayanan Ezhuthassan each of them are entitled one out of seven shares over A and B schedule properties. Suit was filed claiming his share. Second defendant/appellant filed a written statement disputing the claim for partition of plaint A schedule property. Claim for partition of plaint B schedule property was not disputed. Appellant in his written statement contended that as per Ext.B1 sale deed dated 20.1.1983 portion of plaint A schedule property having an extent of 58 x 25 six feet koles was assigned by the father to him and since then he has been in possession of that property and as per Ext.B4 registered will executed by deceased father, the remaining portion of plaint A schedule property was bequeathed to him and so plaint A schedule property is not available for partition. It was contended that after Ext.B1 assignment deed, defendants 1, 3 and 4 trespassed into plaint A schedule property obtained by appellant under Ext.B1 and appellant was compelled

to institute O.S.19/1983 against defendants 1,3 and 4 for recovery of possession and defendants 1 and 3 remained absent and were set ex parte and fourth defendant filed a written statement stating that he has no right over the plaint A schedule property and that suit was decreed and as evidenced by Exts.B2 and B3 delivery receipt and report of the Amin, the property was taken delivery of possession on 2.8.84 and therefore plaintiff or other defendants, are not entitled to claim any share over the plaint A schedule property. It was also contended that suit is barred by principles of res judicata in view of the decree in O.S.19/1983. Defendants 1, 3, 4 and 5 together filed a written statement admitting that appellant instituted O.S.19/1983 and contending that because of misrepresentation made by appellant, defendants 1 and 3 remained absent and fourth defendant filed a written statement stating that he has no right over the property. It was contended that it was the appellant who had engaged the counsel for

fourth defendant and defendants later realised that this was done to give strength to the fraudulent documents created by second defendant and the sale deed and the Will are vitiated and they are also entitled to get their share.

2. Learned Sub Judge framed necessary issues. On the side of the plaintiff he was examined as PW2. He also examined the doctor who treated deceased Narayanan Ezhuthassan as PW1 apart from two other witnesses. On the side of the appellant, he was examined as DW1 and a witness was examined as DW2. Learned Sub Judge on the evidence found that Narayanan Ezhuthassan, the father was under the treatment of PW1 for partial paralysis and Exts.B1 and B4 are vitiated and were got executed by the deceased out of his free will and appellant did not derive any right under Exts.B1 or B4, and plaint A schedule property is available for partition. But learned Sub Judge found that in view of the decree in O.S. 19/1983 defendants 1, 3 and 4 the defendants in that suit are not entitled

to claim any share and their right is barred by principles of res judicata. But it was found that as Exts.B1 and B4 are not valid and binding on the plaint A schedule property and on the death of Narayanan Ezhuthassan his rights also devolved on sixth defendant widow and children and on the death of widow her rights devolved on defendants 1, 3 and 4 also and therefore they are entitled to get the fractional share due to the mother. A preliminary decree for partition was passed directing division of plaint B schedule property into six shares and allotment of one share each to plaintiff, defendants 1, 3 and 4 and division of plaint A schedule property into 42 shares and allotment of one such share over A schedule properties to plaintiff and fifth defendant and one such share each to defendants 1, 3 and 4 and 7/42 shares to plaintiff and fifth defendant. Appellant did not challenge the preliminary decree and judgment. Defendants 1, 3 and 4 filed A.S.18/1988 before District Court, Palakkad challenging the

preliminary decree contending that finding of the learned Sub Judge that their right is barred by principles of res judicata. The learned District Judge on reappreciation of evidence found that rights claimed by defendants 1,3 and 4 in the present suit was not that the same title which was agitated in O.S.19/1983 and therefore the decision in O.S.19/1983 will not operate as resjudicata and therefore defendants 1, 3 and 4 are also entitled to get 1/6th share over plaint A schedule property. The appeal was allowed and the preliminary decree was modified to that extent. Second defendant is challenging the decree in A.S.18/1988 in the second appeal.

3. In the appeal appellant has not only challenged the decree as modified by learned District Judge but also contended that learned District Judge should have considered the correctness of the finding of learned Sub Judge on the validity of Exts.B1 and B4 and should have found that Exts.B1 and B4 are binding on the

plaintiff and defendants and therefore should have set aside the preliminary decree. It was contended that pursuant to the decree in O.S.19/1983 appellant had taken possession of the property and neither Ext.B1 nor Ext.B4 were sought to be declared as invalid and therefore courts below should have found that plaintiff and other defendants are not entitled to claim any share in the plaint A schedule property.

4. The following substantial questions of law were formulated.

1) Is claim of defendants 1, 3 and 4 barred by res judicata in view of the decision in O.S.19/1983 on the file of Sub Court, Ottappalam.?

2) Is the appellant herein entitled to challenge the finding against him, while supporting the judgment of the trial court without filing separate appeal or cross objection in A.S.18/1988?

3) Whether the courts below were correct in granting a decree for partition in respect of the

property covered by Ext.B1 without a prayer to set aside the same.

5. Learned counsel appearing for appellant and fifth respondent were heard.

6. The preliminary decree for partition of plaint B schedule property was not challenged. It was also not disputed that on the death of Narayanan Ezhuthassan his rights devolved on the widow, sixth defendant and plaintiff and defendants 1 to 5 and each of them is entitled to get one out of seven shares. On the death of sixth defendant widow her right equally devolved on her children plaintiff and defendants 1 to 5. The dispute is only with regard to the question whether plaint A schedule property is available for partition. The fact that it was originally belonged to father Narayanan Ezhuthassan was not disputed. The contention raised by appellant was that Narayanan Ezhuthassan executed Ext.B1 assignment deed over a portion of plaint A schedule property and thereafter under Ext.B4 registered will the

remaining portion of plaint B schedule property was bequeathed in favour of appellant and hence the plaint A property is not available for partition. Though no declaration was sought for in the plaint , it has been specifically pleaded in the plaint that second defendant created the father was laid up due to paralysis and could not have executed Exts.B1 and B4 out of his free will and the documents are not valid and binding on others or plaint A schedule property. Defendants 1, 3, 4 and 5 in their written statement contended that Ext.B1 assignment deed and Ext.B4 Will were obtained by appellant by fraud and father was laid up and was not mentally fit to execute the documents and therefore appellant did not derive any right under the documents. PW1 Dr. Santhakumar who was treating Narayanan Ezhuthassan was examined to prove lack of mental capacity of deceased Narayanan Ezhuthassan to execute Exts.B1 and B4. Learned Sub Judge elaborately considered the evidence and found that evidence of PW1 with

admission of appellant as DW1 conclusively establish that Narayanan Ezhuthassan suffered paralytic stroke and was laid up with loss of memory from 1982 onwards. Evidence of PW1 establish that he was treating Narayanan Ezhuthassan from 15.3.1982 onwards and his brain was not functioning properly. Learned Sub Judge on this evidence found that Narayanan Ezhuthassan could not have executed Exts.B1 and B4 out of his free will and volition. On the evidence it was held that Exts.B1 and B4 are not valid and binding on the other legal heirs of Narayanan Ezhuthassan or the plaint B schedule property. Eventhough this factual findings was entered into by learned Sub Judge, rejecting the claim of appellant and it was found that plaint A schedule property is available for partition, appellant did not challenge the correctness of the findings by a regular appeal. Eventhough defendants 1, 3 and 4 filed an appeal challenging the rejection of their share because of the decree obtained by appellant

in O.S.19/1983, even at that stage appellant did not file a cross objection. Learned counsel appearing for appellant relying on the decision of the Apex Court in **K.Muthuswami Gounder v. N. Palaniappa Gounder (A.I.R.1998 SC 3118)** and a learned single Judge of this Court in **Madhavan Achari v. Meenakshi (2003(3) KLT 1069)** argued that even without filing a cross objection respondent is entitled to challenge the finding against him while supporting the findings in his favour and under Rule 33 of Order XL1 of Code of Civil Procedure appellate Court is competent to consider the objection raised by appellant and learned District Judge erred in not considering the challenge raised by appellant and therefore the decree and judgment of learned District Judge are to be set aside and the appeal is to be remanded for fresh consideration. On the facts and circumstances of the case, I do not find it necessary. Evidence of PW1 the doctor is sufficient to establish that

deceased Narayanan Ezhuthassan could not have voluntarily executed either Ext.B1 or B4 as he had suffered a paralytic stroke in 1982. Evidence establish that his brain was not functioning properly. In such circumstance, the finding of learned Sub Judge that Exts.B1 and B4 are vitiated and is not valid and binding on the legal heirs of Narayanan Ezhuthassan is perfectly correct and warrants no interference.

7. If that be the case plaint A schedule property is definitely available for partition among the legal heirs of deceased Narayanan Ezhuthassan.

8. Then the only question is whether defendants 1, 3 and 4 are entitled to claim a share and whether their right is barred by principles of res judicata in view of the decree and judgment in O.s.19/1983. First of all, it is to be born in mind that even though it was contended that a suit for recovery of possession was instituted and the suit was decreed and the property was taken possession

from defendants 1, 3 and 4, neither the plaint nor the written statement nor the judgment nor the decree in O.S.19/1983 was produced. Learned counsel appearing for appellant relying on the decision in **Puthiyottil Kunhava v. Kaniattichalil Mammadkutty (AIR 1990 Kerala 132)** and in **Parvathi Varasiar v. Sulaiman (1988(1) KLT 366)** argued that court shall not reject the plea based on res judicata on hyper technicalities. It was argued that even when there was no specific plea that the suit is barred by principles of res judicata, it was held by this court that the bar imposed under section 11 is on the court not to try any suit or issue in which the matter directly and substantially in issue and decided in a previous suit inter parties and the pleadings establish that appellant instituted the suit on the strength of Ext.B1 assignment deed and obtained a decree against defendants 1, 3 and 4 and therefore learned District Judge erred in interfering with the

findings of the learned Sub Judge that claim for a share raised by defendants 1, 3 and 4 are barred by principles of res judicata and therefore that portion of the decree is unsustainable.

9. A reading of the written statement filed by appellant only shows that what was pleaded was that after obtaining the property covered under Exts.B1 defendants 1, 3 and 4 trespassed and reduced the property in their possession and appellant filed O.S.19/1983 for recovery of possession. It further shows that in that suit defendants 1 and 3 remained absent and were set ex parte and fourth defendant filed a written statement that he does not have any right over the property and the suit was decreed and pursuant to the decree appellant obtained possession in execution of the decree and therefore rights of defendants 1, 3 and 4 is barred by principles of res judicata. There is no plea in the written statement of the appellant that O.S.19/1983 was filed on the strength of title derived under Ext.B1 assignment deed or that he

asserted that he is the absolute owner under Ext.B1 and defendants 1, 3 and 4 have no right. He has also not pleaded in the written statement that fourth defendant had admitted his title under Ext.B1. What was pleaded was only that fourth defendant filed a written statement that he does not claim any right over the property. Admittedly on the date when O.S.19/83 was filed, or where the decree was passed in that suit defendants 1, 3 and 4 have no subsisting right over the plaint A schedule property. They could claim right only as legal heirs of Narayanan Ezhuthassan and that could only be subsequent to his death. Therefore the right that could have been raised or agitated by defendants 1, 3 and 4 is not the right which they derived on the death of Narayanan Ezhuthassan. Therefore, by no stretch of imagination, it could be said that the plea for a share over plaint A schedule property which was available to defendants 1, 3 and 4 after the death of Narayanan Ezhuthassan, is barred by principles of res

judicata in view of the decision in O.S.19/1983. Learned District Judge rightly found that the decree in O.S.19/1983 will not bar defendants 1, 3 and 4 from getting their share as they are also entitled to get equal share along with plaintiff and other defendants.

There is no merit in the appeal. It is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.144 /1993

JUDGMENT

9TH MARCH, 2007